Supreme Court, U.S.
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Docket No. THE CLERK

SUPREME COURT
OF THE UNITED STATES

October Term, 1995

VERNON CURD,

Petitioner

vs.

CITY OF SEARCY, ARKANSAS
and the SEARCY, ARKANSAS
BOARD OF PUBLIC UTILITIES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Submitted by:

Vernon Curd, *pro se*
1200 Curd Drive
Searcy, Arkansas 72143
(501) 268-2813

45 pp

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STATEMENT OF LEGAL QUESTIONS

1. The first legal question presented to this Court for determination is whether a party who pleads and shows that he suffers from physical and neurological conditions which make representing himself in a federal lawsuit very ill-advised, and at times next to impossible, may appoint a next friend to proceed on his behalf by a valid power of attorney authorizing the attorney-in-fact to proceed *pro se* or to hire an attorney-at-law. The question should hinge upon not only the detrimental effects that the legal proceedings are sure to have on the party, but the party's decreased ability to argue complex legal issues under stress. It should be determined whether the interests of justice would be better served by requiring a stroke victim with a heart condition to argue the case, or by allowing his appointed next friend, who, although a layman, is competent to argue complex legal and constitutional issues, to argue the case in his place.

2. The next legal question submitted to this Court for decision is whether a district court may properly deny a request for a preliminary injunction when neither party has submitted arguments concerning the standard for granting preliminary injunctions. It should be determined whether it is proper for a district court to make a decision as to whether violation of constitutional rights constitutes irreparable harm, whether a preliminary injunction will detrimentally affect the defending party and whether this detrimental effect outweighs the threat of irreparable harm, whether the party requesting the injunction is likely to succeed on the merits, and what the particular character of the public interest involved is, without having reviewed specific arguments on these points from both sides. Sub-issues concern the specific determinations that violation of constitutional rights is not irreparable harm, that, in the present

case, granting the injunction would have too greatly harmed the defending parties and would have worked against the public interest.

3. The third legal question submitted to this Court concerns whether a district court should first strive to dispose of a case on non-constitutional grounds, rather than first deciding a constitutional claim
and hinging all other claims in the complaint to the constitutional claim. *Ashwander v. TVA*, 297 U.S. 288, Brandeis J., concurring; *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175; *Light v. United States*, 220 U.S. 523, 538

4. The fourth legal question brought before this Court concerns the standards for granting summary judgment. It should be determined whether a district court may, *sua sponte*, grant summary judgment on specific claims for a party which has not requested summary judgment. It should also be determined whether a *pro se* litigant who has moved for summary judgment is entitled to notice from the court that his motion fails to sufficiently prove the facts requisite to granting summary judgment before the court denies the motion, although unopposed, and grants said summary judgment to a party who has never so moved.

5. The fifth legal question to be determined by this Court is whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States of America require public utilities to serve all territories within their franchise area on reasonable terms, or whether it is a violation of these constitutional principles for a public utility that is owned by a municipality to pick and choose, serving only those areas within its franchise area which it is profitable to serve, and to further extend service beyond its franchise area while 20% of the population within the franchise area has been

denied access to the service on reasonable terms. *New York ex rel. New York and Q Gas Co. v. McCall*, 245 U.S. 345; *United Fuel Gas Co. v. R.R. Commission*, 278 U.S. 300

6. The sixth and final legal question presented to this Court is whether citizens have a right, under the Ninth Amendment, to good government, and whether this right may reasonably be incorporated under the Fourteenth Amendment. This issue should be considered in light of the facts that, although municipalities are generally governed, in large part, by elected officials, that the present case arises from a local political situation where electoral liability (being voted out of office) is not considered a threat to those who are firmly wedged into power positions and where recall of public officials is next to impossible. This case also deals with a defendant board of public utilities which seems to function as a self-perpetuating, independent municipal entity with no accountability to anyone.

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Comes petitioner, Vernon Curd, *pro se*, and respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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REFERENCE TO REPORTS

The three sentence *per curiam* opinion of the court of appeals sought to be reviewed was issued as unpublished. The case was designated as Civil Appeal No. 95-4257.

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BASIS OF JURISDICTION

1. The *per curiam* opinion of the court of appeals of which the petitioner seeks review was filed in the United States Court of Appeals for the Eighth Circuit as issued by Fagg, Bowman, and Hansen, Circuit Judges, on June 21, 1996.

2. The Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari under 28 USC 1254

3. **Constitutional Provisions, Statutes, etc.**

(a) Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

(b) Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(c) 42 USC 1983 (in relevant part)

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

(d) Arkansas Constitution and Statutes

Const. Of Ark., Art. II

Sec. 22. The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefore.

Sec. 23. The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded; and the General Assembly may delegate the taxing power with the necessary restriction, to the state's subordinate political and municipal corporations to the extent of providing for their existence, maintenance, and well being, but no further.

ACA 14-234-111(a). Any municipality in the state of Arkansas owning and operating a municipal waterworks system or a municipal sewer system or both may extend its service lines beyond its corporate limits for the purpose of giving water service, sewer service, or both, to adjacent areas where the demand is sufficient to produce revenues that will retire the cost of the service lines.

ACA 14-201-329. Any taxpayer in any city or town in this state where this subchapter shall be adopted shall have the right to institute a suit against the board of public utilities or any member thereof for any sums of money or any property that may be misappropriated or misused by the board or any member thereof.

ACA 14-40-606. As soon as the resolution or ordinance declaring the annexation has been adopted or passed, the territory shall be deemed and taken to be a part and parcel of the limits of the city or incorporated town, and the inhabitants residing therein shall have and enjoy all the rights and privileges of the inhabitants within the original limits of the city or incorporated town.

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STATEMENT OF THE CASE

The City of Searcy, Arkansas, annexed the area where the Petitioner resides and owns property in 1972. For twenty-three years, the Petitioner has tried to convince his city and its board of public utilities to extend city sewer service into the

area. Neither the City of Searcy, nor the Searcy Board of Public Utilities has offered terms which the petitioner finds to be reasonable. It has consistently been demanded by the Board that the entire cost of the project be paid for by those who would benefit from it before the lines will be extended.

The Searcy water and sewer system in under the control of the Searcy Board of Public Utilities, a public utility whose franchise is coextensive with the city limits of the City of Searcy. At no time may the Board act where the City has no authority to act. According to figures compiled by the City and the Board, approximately 20% of the residents of Searcy are without sewer service.

The Petitioner, Vernon Curd, filed suit, by and through his grandson and lawful attorney-in-fact as next friend, under 42 USC 1983 on February 22, 1995, alleging violations of the Ninth and Fourteenth Amendments to the Constitution of the United States of America, as well as violations of Article II, Sections 22 and 23 of the Constitution of the State of Arkansas, and ACA 14-234-111(a)

It was shown that Labickas had a lawful power of attorney to proceed in the name, place, and stead of Curd. The defendants therein argued that Labickas was engaged in the unauthorized practice of law, never really addressing the power of attorney. Citing Curd's physical condition and the detrimental effect that the stress of having to personally litigate a federal lawsuit would have on his condition, Curd argued that Labickas should be allowed to proceed in his place. On March 22, 1995, the district court ordered that Labickas be allowed to assist Curd, but that he not be allowed to sign documents or make court appearances in this case.

Curd alleged that the City of Searcy and its Board of Public Utilities denied him equal protection of the laws and due process of law, in violation of the Fourteenth Amendment, by annexing his residence and property and refusing to extend municipal sewer service into that area, while extending sewer

service to areas annexed at later times. Curd also alleged that for the Board of Public Utilities, which operates the Searcy Water and Sewer System, to extend the sewer trunk line beyond the city limits in order to prepare to serve future residents of the city under one statute, while failing to provide the same service to his area, which had been annexed some twenty-three years earlier, constituted a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Curd cited ACA 14-40-606, which requires the extension of the rights and privileges of inhabits of the original city upon annexation.[1]

Asserting that the Ninth Amendment protects a citizen's right to good government, Curd alleged that the City and the Board had denied him good government through their actions described in the case.

Curd also alleged that the actions of the Board in extending the sewer trunk line 4,600 feet beyond the city limits without sufficient demand to retire the cost of the lines was a misappropriation or misuse of funds under ACA 14-234-111(a), suit for which is authorized by ACA 14-201-239.

Additionally, Curd alleged that the City annexed the area in which he resides and owns property for taxation purposes only. Curd argued that the City receives numerous tax benefits as a result of the annexation, but has made no effort to provide essential city services. Article II, Sections 22 and 23 of the Constitution of the State of Arkansas are read to prohibit the annexation of land for taxation purposes only. *Saunders v. City of Little Rock*, 556 S.W. 2d 874 (Ark. 1977)

Curd had requested a preliminary injunction estopping the City and the Board from engaging in activities which violate his rights under the Fourteenth Amendment. The district court denied the injunction on June 8, 1995, citing Curd's failure to

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1. *Gregg v. Hartwick*, 731 S.W. 2d 766 (Ark. 1987) held that annexation requires the extension of the municipal services offered by the city.

show a threat of irreparable harm and noting that the specific factors necessary for the granting of a preliminary injunction were not discussed by either party.

Curd filed a motion for summary judgment on the Fourteenth Amendment claims and the state law claims, stating that there was no triable issue of fact and that the legal issues should be resolved in his favor. The City and the Board moved for summary judgment on the federal claims, but did not address the state law claims, either to move for summary judgment or to address Curd's motion for summary judgment on those claims.

On November 22, 1995, the district court granted summary judgment for the defendants, finding that there is no legally enforceable right of a citizen to the municipal services offered by the city in which he lives.[2] Thus there was deemed to have been no denial of equal protection or due process. The district court apparently held all other claims to hinge on the equal protection claim, granting summary judgment on all claims. The decision of the district court rests almost entirely on a case which holds that there is no right to municipal services for non-residents of the municipality offering the services. The order of the district court evidenced no independent consideration of the state law claims.

Curd appealed to the United States Court of Appeals for the Eighth Circuit. In the court of appeals, Curd argued that, due to his medical condition, he should be allowed to have his grandson and attorney in fact proceed for him. He attached letters from his physicians which showed that the stress of having to personally take care of the case would have detrimental effects on his already declining health. The City and

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2. The district court cited *Blackwell v. City of St. Charles*, 917 F. 2d 1150 (8th Cir. 1990), which dealt with an asserted right to city services by non residents of the city.

the Board reargued their point that allowing Labickas to proceed for Curd would be allowing Labickas to engage in the unauthorized practice of law.

Also on appeal, Curd argued that the district court should have tried first to dispose of the case on the non-constitutional grounds, rather than resolving one constitutional issue and tying the fate of the other claims in the complaint to that of the constitutional claim. The City and the Board never really directly addressed this argument.

Additionally, Curd argued that the district court had granted summary judgment *sua sponte* to the City and the Board, a practice which violates applicable Eighth Circuit precedent. Curd also argued that he was entitled to notice from the district court that he had failed to offer sufficient proof of facts applicable to the summary judgment motions.[3] The City and the Board barely touched on these issues.

Lastly, Curd argued that his Fourteenth Amendment rights had indeed been violated, showing that the Arkansas Supreme Court had interpreted state law to require the extension of municipal services upon annexation.[4] The City and the Board argued that Curd was misinterpreting the law, and that no violation of his rights had occurred.

On June 21, 1996, the court of appeals issued its three sentence affirmance of the district court's resolution of the case

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3. *English v. Cowell*, 10 F. 3d 434; *U.S. Development Corp. v. Peoples Federal Savings & Loan Assn.*, 873 F. 2d 731 (4th Cir. 1989); *Timms v. Frank*, 953 F. 2d 281 (7th Cir. 1992)

4. *Gregg v. Hartwick*, 731 S.W. 2d 766 (Ark. 1987)

ARGUMENT

A
Introduction

One of the major problems the Petitioner has with the court of appeals' resolution of this case is the lack of a reasoned opinion as to the justifications for its decision. Opinion writing is exactly what preserves the public perception of integrity and legitimacy in the courts. Decisions issued without reasoned opinions at least appear to be, and probably are, heavy-handed, utterly capricious responses to arguments which, although correct in the law, strike a sour note with a group of appellate judges. Since the vast, vast majority of the decisions issued without full opinions are affirmances, the courts of appeals appear to be saying that the district court is right "because we said so."

Society has a strong distaste for capricious actions. Just like a child doesn't accept "because I said so" from his parents, society doesn't accept it from the courts, and the perception of integrity and legitimacy in the courts suffers. If there ever was a case in which a case merited a decision without a reasoned opinion, it would be one where the appellant proffered no plausible reason why the district court was in error with its decision. The present case is no such case. On appeal, Curd offered compelling arguments which demonstrated clear error on the part of the district court. Most notably, Curd brought attention to the district court's use of a case which held that non-residents have no legally enforceable right to the municipal services of a particular city to justify its finding that Curd, a resident of the City of Searcy, Arkansas for over twenty years has no legally enforceable right of reasonable access to the

municipal services offered by that city.[5]

Perhaps the court of appeals issued its opinionless decision because Curd was proceeding *pro se*. Well, *pro se* is not Latin for *stupid*. Curd knows enough to realize that the decision of the district court was a miscarriage of justice and that the decision of the court of appeals, which offers no justification for its position is simply a capricious act of distaste for people who choose to fight city hall, which decision only serves to further the humiliating error of the district court. The district court's use of clearly inapplicable precedent to justify its position shows clear bias, as well as a clear disregard for Curd's rights and the Constitution of the United States of America. The action taken by the court of appeals was an equally shameful endeavor in disregard for the Constitution and individual rights.

In affirming the district court's decision that Curd, who is a stroke victim with a heart condition, could not appoint a person of his choosing to proceed as his next friend, the court of appeals decided an important question of federal law that has not been, but should be, decided by this Court. The decision of this issue holds serious implications for persons who, due to physical and neurological problems, are unable to effectively prosecute their own case, and who, for one reason or another, are unable to obtain the services of an attorney-at-law.

The court of appeals also decided an important question of federal law which has not been, but should be, decided by this Court in affirming the grant of summary judgment on the Ninth Amendment claim. The Supreme Court should decide if the people indeed have the right to good government as an aspect of the Ninth Amendment, and if this right can be applied to the states through the Fourteenth Amendment. This is an important issue for all those who have experienced very poor

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5. *Blackwell v. City of St. Charles*, 917 F. 2d. 1150 (8th Cir. 1990)

government and have experienced equally poor results in using the ballot or any recall mechanism provided by state law to assign liability, or even accountability, to government entities which trample on their rights or otherwise grossly fail to serve the people.

The court of appeals, in disregarding Curd's arguments, decided a federal question in a way that conflicts with applicable decisions of this Court. By affirming the district court's resolution of the case, the court of appeals not only stretched inapplicable precedent cases far beyond the bounds of reason to apply to this case, but the court of appeals also decided the matter in a manner which suggests a theory completely contradictory to the reasoning previously applied by this Court - the long-accepted rule that a public utility must provide service on reasonable terms to all those within its franchise area.[6]

The court of appeals has also rendered a decision in conflict with the decision of another United States Court of Appeals. When the court of appeals affirmed the district court in denying Curd summary judgment and granting summary judgment to the City and the Board, even though the district court had not given Curd, a *pro se* litigant, notice of a perceived deficiency in his pleadings and allowed him to correct the perceived deficiency, the court of appeals ignored a directly applicable decision of the courts of appeals for the Fourth and Seventh Circuits.[7] This decision was brought to the attention of the court of appeals before the decision was handed down.

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6. *New York ex rel. New York* and *Q Gas Co. v. McCall*, 245 U.S. 345; *United Fuel Gas Co. v. R.R. Commission*, 278 U.S. 300.

7. *English v. Cowell*; *U.S. Development Corp. v. Peoples Federal Savings & Loan Assn.*; *Timms v. Frank*; citations *supra*.

B

The Court of Appeals Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled by This Court

The issue of whether a person who is suffering from such cardiological and neurological conditions as to make the stress of prosecuting a federal lawsuit unacceptable may appoint a layman to proceed as his next friend under power of attorney should, at this time, be decided by the Supreme Court. The Petitioner has witnessed many instances where persons with legitimate disputes who were unable to prosecute a case themselves were denied access to an attorney-at-law by a combination of social, political, and economic factors and thus did not see vindication of their rights. This issue is of vast importance to all who may have reasonable ability to function in society but are not capable of withstanding the stress or mental gymnastics associated with personally litigating a federal cause of action.

In the instant case, the petitioner is experiencing heart flutters although he has a pacemaker, and he is in consultation with his physicians to determine whether the persistent problem may have been brought on by his unduly heightened involvement with this case. The findings of the physicians will be made available to this Court in a motion for leave to proceed through a next friend, to be filed in the near future.

The petitioner has also recently been experiencing considerable problems with short-term memory and association, probably the result of his stroke. His physicians' findings on this problem will also be made available to the Court in the motion mentioned above. Due to the continuing and progressive nature of the Petitioner's physical and neurological ailments, it is now more important than ever that he be allowed to proceed through a next friend.

The interests of justice mandate that Curd be allowed to

proceed through his next friend. Justice and judicial economy can only benefit from allowing the case to be argued by a more healthy and more competent next friend.

C
The Court of Appeals Has Decided a Federal Question in a Way That Conflicts With Applicable Decisions of This Court

Certiorari should be granted because the court of appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. The holding of the court of appeals in this case is that a person who is within the franchise area of a public utility has no affirmative right to the services offered by that public utility. In affirming the district court, the court of appeals upheld an opinion which provides that a public utility is not bound to provide service to all persons within its franchise area. The district court was of the opinion that a public utility may decide when to provide service to areas within its franchise, or whether to provide service at all. The district court also adjudged that the utility alone may determine the terms upon which service is provided, and that these terms, regardless of how unreasonable they may be, must be complied with before the utility is required to provide service. The district court was also of the opinion that a public utility is free to extend service beyond its franchise area, while leaving areas within its franchise area unserviced.

The decision of the district court and the affirmance by the court of appeals flies in the face of applicable decisions of the Supreme Court of the United States. *New York ex rel. New York and Q Gas Co. v. McCall*, 245 U.S. 345, held as follows:

> Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by

> their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort, without the service which they alone can render. 254 U.S. at 351

United Fuel Gas Co. v. R.R. Commission, 278 U.S. 300, further held that "the primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders ..."[8] and that a public utility cannot refuse to serve an area that is within its franchise area where the return is inadequate unless the extension of the service would surely result in the financial ruin of the utility.

The lower courts were wrong in allowing the City of Searcy and its Board of Public Utilities to refuse to extend sewer service to areas within the city limits which the Board deemed to be unprofitable at the moment. The opinions of this Court cited above make it abundantly clear that the lower courts violated well established principles laid down by this Court as to the duties of a public utility. Although not explicitly so, the cited cases are grounded in the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Denial of equal protection and due process are the specific federal claims brought by Curd in the original complaint. Curd believes that the pleadings in the case below demonstrate that the City of Searcy and its Board of Public Utilities have acted so arbitrarily and capriciously as to have violated relevant constitutional standards of equal protection and due process.

In the court of appeals, Curd suggested that the court should apply an undue burden test, similar to that established by the Court in *Planned Parenthood of Southeastern Pennsylvania*

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8. 278 U.S. at 309

v. Casey, 112 S. Ct. 2791 (1992). The undue burden test is grounded in reasonableness, and its suggestion is justified by the reasonableness standard set forth in *United Fuel Gas Co. v. R.R. Commission*. In fact, that case seems to advocate a test identical to the one suggested by Curd in the case below. The Court has established the standard that services are to be provided on reasonable terms to all who desire the service. A utility policy which places an undue burden upon persons in gaining access to the service is not reasonable and, therefore, violates applicable constitutional principles.

Respondents will likely argue that the cited cases do not apply to them because they are organized differently than the utilities which were the subject of the cases herein relied upon. This is simply not the case. There could hardly be a more appropriate setting for the rule than where a municipality owns and operates its own water and sewer utility. A public utility could hardly be more devoted to public use than where it is owned and operated by municipality and billed as a governmental entity.

It should also be evident that it is a further violation of the rule for a public utility to extend services beyond its franchise area, regardless of the motives, when large areas of territory and a significant percentage of the population within its franchise area remain without the service due to the utility's refusal to extend the service into those areas. As has been stated, the franchise area of the Board of Public Utilities is coextensive with the limits of the City, for a city cannot grant a franchise which extends into territory not under its jurisdiction. It has also been shown in the case below that a significant percentage of the population of the City is without municipal sewer service, due to the refusal of the City and the Board to extend the service into those areas. In fact, roughly 20% of the persons within the franchise area of the Board have no municipal sewer service, which the City and the Board alone can provide. The rule is most clearly violated when the utility

chooses to extend service beyond its franchise area, as the Board did with the Deener Creek sewer trunk line extension, while leaving 20% of the population already within its franchise area without the comfort of this essential municipal service.

The reliance of the district court and the court of appeals upon wholly inapplicable precedent cases is absolutely shameful. The district court, in exhibiting a considerable bias against those who would fight city hall, reached out to rule in favor of the City and the Board. Since summary judgment would not have been granted if the district court had found Curd to be correct on the law, a discussion of the propriety of the grant of summary judgment is unwarranted in this specific discussion. What is warranted is a discussion of how the "precedents" relied upon by the district court have no applicability to the controlling issue of whether the City and the Board violated Curd's rights of equal protection and due process. Some cases dealt with state law from states other than Arkansas,[9] and not one case dealt with a state law requiring the extension of municipal benefits upon annexation. Other cases dealt with quite different issues of state law regarding the provision of municipal services.[10] Still another case dealt with an attempt to hold a municipality liable for not providing water and sewer service to those outside of its corporate limits just for the mere asking. The application of that case, *Blackwell v. City of St. Charles*, to this case is reprehensible. The key issue in that case, as in this case, was the residence of the party seeking the services. No court has any business misusing precedent so grievously. Not only are all of the cases relied upon by the

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9. *Barnhardt v. City of Kannapolis*, 447 S.E. 2d 471 (N.C. 1994)

10. *Pea v. Kingsworthy*, 190 S.W. 565 (1916) dealt with the right of a city to charge for connection, and *City of Marion v. Baioni*, 850 S.W. 2d 1 (1993) dealt with disparities in rates for service.

district court inapplicable to the core issue at hand, but the court of appeals did not even attempt to address the fact that the district court was unable to come up with a case that dealt with a city resident suing for a refusal to provide services on reasonable terms where state law requires extension of the benefits upon annexation. The court of appeals completely ignored the Arkansas Supreme Court's interpretation of state law to require the extension of services upon annexation, blindly accepting the unreasonable and illogical interpretation of the district court and opposing counsel.

In affirming the district court's disposition of the case, the court of appeals contradicted a well established rule in the disposition of cases which bring constitutional claims as well as non-constitutional claims. That element of the *Ashwander* rule which is grounded in *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191, and *Light v. United States*, 220 U.S. 523, 538, counsels that a court first try to dispose of such a case on the non-constitutional grounds before entering on an interpretation of the Constitution. The gross misinterpretation of the Constitution by the district court, and the subsequent, and equally unacceptable, opinionless affirmance by the court of appeals provide an excellent example of the atrocities the rule was meant to stem. Although the case cannot be completely resolved by the application of state law, the Petitioner believes he should have been granted summary judgment on these claims in the first order.

D

The Court of Appeals Has Rendered a Decision in Conflict With the Decision of Another United States Court of Appeals

Fourth and Seventh Circuit precedent holds, as set out on page 10 of this petition, that, where a *pro se* litigant is involved, a district court may not render a decision as to

summary judgment against the *pro se* litigant without first having notified him and allowed him to correct the deficiency. In the present case, the district court should have notified Curd of any perceived inadequacy in the pleadings surrounding the motions for summary judgment and allowed him to attempt to correct them before rendering summary judgment in favor of the City and the Board.

However, it is the belief of the Petitioner that summary judgment would not have been granted to the defending parties if the district court had been guided by the right precedent in its evaluation of his interpretation of the law. This issue may be rendered moot by a reversal of the determination that Curd has no legally enforceable right to the utilities offered only by the city in which he has lived for twenty-three years.

E
Other Eggredious Errors

Certiorari should also be granted because of other eggredious errors on the part of the district court and court of appeals. The specific errors, as set out below, should be significant enough to warrant review by this Court.

The district court grossly abused its discretion in granting summary judgment for the City and the Board as to claims on which they never sought summary judgment. In fact, these claims are ones upon which Curd sought summary judgment against which the City and the Board failed completely to defend. Given that Curd had moved for summary judgment on the state law claims, and the City and the Board had failed to defend against the motion, it only seems proper that summary judgment be granted in favor of Curd. The action of the court of appeals in affirming the district court in light of these arguments is an eggredious error which, in and of itself, seems to warrant review by this Court.

As to the request for a preliminary injunction, the court

of appeals' affirmance of the district court's determination of the issue without having ordered the submission of relevant arguments by the parties also constitutes eggredious error which alone warrants review of this aspect of the case by the Supreme Court. This issue should be remanded, so that the parties may submit their relevant arguments to the district court.

F
Conclusion

Certiorari should be granted, so that the Court may review the decision of the lower courts. The central issue is that the district court and the court of appeals ignored Supreme Court precedents concerning public utilities, as well as the fact that state law has been interpreted to require the extension of services upon annexation. The court of appeals also decided that the district court was correct in its resolution of the summary judgment motions without allowing Curd the opportunity to correct perceived deficiencies. This contradicts applicable Fourth and Seventh Circuit precedent. Additionally, in affirming the decision of the district court as to the next friend issue and the Ninth Amendment claim, the court of appeals decided important issues of federal law which should be settled by this Court.

The central issue of this case is that of whether the Board of Public Utilities was indeed required to extend sewer service into the area where Curd lives and owns property upon annexation. All other issues, with the exception of the preliminary injunction issue, may very well be held to hinge on this central issue. Thus the Petitioner believes that it is this issue that should receive the fullest attention of the Court.

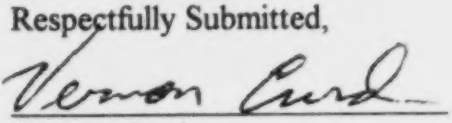
The net of the actions of the district court and the court of appeals is a shameful and misguided travesty of justice. The lower courts strove to find the way they did, so as to discourage

others who would stand up for their rights and fight city hall.

WHEREFORE,

the Petitioner prays this court grant the requested writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,



Vernon Curd
1200 Curd Drive
Searcy, Arkansas 72143
(501) 268-2813

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Vernon L Curd,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Arkansas
City of Searcy, Arkansas;	*	
Searcy Board of Public	*	[UNPUBLISHED]
Utilities,	*	
Appellees.	*	

Submitted: June 20, 1996

Filed: June 21, 1996

Before FAGG, BOWMAN and HANSEN, Circuit Judges.

PER CURIAM.

Vernon L Curd appeals from the final judgment of the District Court[1] dismissing his civil rights and pendent state law claims. Having carefully reviewed the entire record and the parties' submissions, we conclude that the judgment of the District Court was correct. Accordingly, we affirm. See 8th Cir. R. 47 b.

1. The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VERNON L CURD PLAINTIFF

v. Civil No. LR-C-95-112

CITY OF SEARCY, ARKANSAS, ET AL. DEFENDANTS

ORDER

Pending before the Court is defendants' March 13th motion for order enforcing Local Rule B-1. Plaintiff responded on March 16th. On March 21st, defendants filed a second motion since Labickas has propounded discovery to defendants and has attempted to respond to discovery propounded by them. At issue is the status of Steven C. Labickas, pursuant to a power of attorney executed by plaintiff, to sign documents on plaintiff's behalf and to exclusively receive communications from opposing counsel and the Court. Defendants do not object to Labickas assisting the plaintiff.

28 USC 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." This provision has consistently been interpreted that the named party must personally sign all pleadings and is the only person to whom communications are directed even if a third party claims authority through contract or power of attorney. Smith v. Butler County Jail, 986 F. 2d 21, 1992 WL 14672 (10th Cir. 1992); Herrera-Venegas v. Sanchez-Rivera, 681 F. 2d 41 (1st Cir. 1982); Weber v. Garza, 570 F. 2d 511 (5th Cir. 1978); U.S. v. Marcoccia, 1994 WL 377747 (D. Or.

1994); McCants v. Village of Broadview, 1994 WL 117478 (N.D. Ill. 1994); Lutz v. Lavelle, 809 F. Supp. 323 (M.D. Pa. 1991). Copies of the Westlaw opinions are attached for the parties' convenience. Labickas is also referred to Undem v. State Bd. of Law Examiners, 266 Ark. 683, 587 S.W. 2d 563 (1979) and Arkansas Bar Association v. Block, 230 Ark. 430, 323 S.W. 2d 912 (1959) regarding what is considered the unauthorized practice of law. See also, Arkansas Attorney General Opinion No. 89-285 which is Exhibit H to defendants' March 21st brief.

Labickas will be allowed to assist the plaintiff, his grandfather; however, he will not be permitted to appear or sign documents in this Court on plaintiff's behalf. All written and oral communications from defendant's counsel and the Court will be directed solely to plaintiff.

Accordingly, defendants' March 13th and 21st motions for order enforcing Local Rule B-1 are granted.

IT IS SO ORDERED this 21 day of March, 1995.

s/ George Howard, Jr.
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 3-22-95 BY J. Dugger

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VERNON CURD PLAINTIFF

v. Civil No. LR-C-95-112

CITY OF SEARCY, ARKANSAS, ET AL. DEFENDANTS

ORDER

Plaintiff filed suit on February 22nd pursuant to 42 USC 1983 alleging denial of due process and equal protection in providing of city services. He asked for compensatory and punitive damages and for an injunction to estop the defendants from making or allowing any connection to the Deener Creek trunk extension and from providing sewer services to the proposed Arkansas National Guard armory site or any other areas annexed into the City after November of 1972. Defendants answered on March 7th.

On April 17th, plaintiff filed a separate request for preliminary injunction that as his land was annexed prior to the new armory site, any action to provide sewer service to the site would be a further denial of equal protection. Defendants responded on April 23rd that plaintiff would have been able to receive city sewer service if he had followed the policy that the end user pays the cost of installing the lines needed by the end user to connect to the city's sewer trunk line. Plaintiff filed a reply on April 24th that he has never asked to be connected to the system for free and defendants have failed to show a legitimate governmental objective by their actions.

The standard for the issuance of a preliminary injunction

is found in Dataphase Systems, Inc. v. C L Systems, Inc., 640 F. 2d 109 (8th Cir. 1981). The Court must consider the threat of irreparable harm to the plaintiff, the state of balance between such harm and the injury that granting the injunction will inflict on other parties litigant, the probability that the plaintiff will succeed on the merits, and the public interest. Neither plaintiff nor defendants addressed these factors in their submissions.

The Court finds that plaintiff has not met his burden based on the current record. Most importantly, he has failed to demonstrate irreparable harm. It would appear that if plaintiff were successful on the merits, the available remedies of an injunction coupled with damages would make him whole. In addition, violations of state law alone are not actionable under 42 USC 1983 and the record is not sufficiently developed on the equal protection and due process claims. The harm to other parties litigant and the public interest factors both tilt against an injunction at this stage.

Accordingly, plaintiff's April 17th second motion for preliminary injunction is denied.

IT IS SO ORDERED this 8th day of June, 1995.

s/ George Howard, Jr.
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 6-9-95 BY J. Dugger

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VERNON L CURD PLAINTIFF

v. Civil No. LR-C-95-112

CITY OF SEARCY, ARKANSAS, ET AL. DEFENDANTS

ORDER

Seeking compensatory and punitive damages and injunctive relief, plaintiff filed suit on February 22nd pursuant to 42 USC 1983 alleging denial of due process and equal protection in the defendants' failure to provide him city sewer services. He also alleged a pendent state claim for misappropriation of funds pursuant to Ark, Code Ann. 14-201-329.

Pending before the Court is plaintiff's June 16th motion for partial summary judgment and defendants' July 3rd motion for summary judgment. Each motion, supported by a brief and separate statements concerning undisputed facts, has been responded to and so are ripe for decision.

Summary judgment can properly be entered when there are no genuine material facts that can be resolved by a finder of fact; that is, there are no facts which could reasonably be resolved in favor of either party. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986). The non-moving party may not just rest upon his or her pleadings, but must set

forth specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986); Civil Procedure Rule 56. "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome-determinative under prevailing law." Holloway v. Pigman, 884 F. 2d 366 (8th Cir. 1989).

Local Rule C-10 provides that a party moving for summary judgment must file a separate, short and concise statement of material facts as to which it contends there is no genuine issue to be tried. The rule further provides that unless the non-moving party files a separate, short and concise statement of the facts as to which it contends a genuine issue exists to be tried, all material facts set forth in the moving party's statement will be deemed admitted.

The following paragraphs of the plaintiff's June 16th statement of undisputed facts are admitted by defendants in their July 3rd response:

1. The Plaintiff resides in the area of Searcy referred to as the Headlee Heights area.

2. The Plaintiff's property was annexed in November of 1972.

4. City sewer service has been made available to areas of Searcy annexed after November of 1972, and the City of Searcy and its Board of Public Utilities actively continue to allow new connections in such areas.

5. The City of Searcy, Arkansas collects a city property tax from city residents, as well as a city tax and a municipal franchise fee on all utilities.

6. According to discovery material provided by the Defendants, the total cost of the Deener Creek sewer trunk line extension was $617,372.90.

7. The portion of said trunk line which extends beyond the city limits consists of approximately 4600 linear feet of 24" sewer pipe.

8. The Deener Creek sewer trunk line extension was

constructed entirely across private property.

9. The City of Searcy and its Board of Public Utilities will not allow a connection to said extension without the area to be connected first being annexed into the City.

The following paragraphs in defendants' July 3rd statement of undisputed facts are admitted by plaintiff in his July 13th response:

1. The City of Searcy ("the City") operates its water and sewer service through its Board of Public Utilities.

2. The Board of Public Utilities ("the Board") determines the policies for the provision of water and sewer service.

4. It is the policy of the Board to require the owner(s) of the property to be served by a water or sewer service line extension to pay in advance for the cost of extending water and sewer service lines; however, the Board pays in advance for the cost of building trunk lines and the additional cost of oversizing extended service lines when the Board determines that the size of the service line needed to serve the customer requesting the extension is smaller than the size of the service line needed accommodate planned future water and sewer line capacity needs, including anticipated future customers on down the service line.

7. The Deener Creek trunk line extension was built as a part of a long term plan for accommodating future needs of the city, including areas of the city which will most likely be soon developed and annexed into the city limits. The Board believes the city is growing in the direction of the Deener Creek trunk line and has built that trunk line to accommodate that city growth.

8. The Deener Creek trunk line extension was paid for by the Board; however, in order to recoup the cost of installing the trunk line, the Board's policy requires that (in addition to the fees already established to connect to the sewer system generally) a single residential connection will pay an additional

$300.00 hook-up fee for service via the Deener Creek trunk line extension; a multi-family residential connection will pay a $300.00 hook-up fee for the first unit and a $150.00 hook-up fee for each additional unit for service via the Deener Creek trunk line extension; and a commercial connection will pay an additional hook-up fee of $600.00 for service via the Deener Creek trunk line extension.

9. No connection will be allowed to the Deener Creek sewer trunk line unless the area to be serviced by that connection is annexed into the City; and, furthermore, any developer or individual desiring sewer service would pay for all costs of extending the sewer system from the trunk line to the property to be serviced, except for any oversizing expense, which would be paid by the Board (as explained above).

11. The policies of the Board have been uniformly applied to all persons similarly situated, including Mr. Curd. The policies of the Board are rationally related to the legitimate objective of the City and the Board. Specifically, there is not sufficient revenue otherwise available to enable the City or the Board to incur the cost of constructing all water and/or sewer lines. Furthermore, it is logical and practical to require that the person receiving the benefit of water and sewer line extensions pay for these extensions. Said extensions increase the value of the property served and the system used assigns the cost to the end users on a pro rata basis that is both rational and equal. The City and the Board choose not to serve as the bank for financing the end user's cost of construction (i.e., does not construct the extension line using City or Board money, subject to collections on subsequent water or sewer bills) because the accounting problems would be legion and the city's otherwise available bond revenue financing ability would be decreased, leaving the city with less capacity to finance other subsequently needed city facilities the construction of which cannot be directly allocated to persons actually and directly benefiting from said facilities (such as jails or the like).

12. Plaintiff lives in a house on a 3.5 acre parcel of land at 1200 Curd Drive inside the city limits of Searcy, Arkansas.

13. Plaintiff also owns and manages a mobile home park at the same location as his residence.

14. Mr. Curd's mobile home park houses nineteen families.

15. Sewer service at 1200 Curd Drive is provided by a single septic tank which has the capacity to accommodate twenty families.

16. Plaintiff lives in a neighborhood containing roughly fifty to seventy-five homes, not including the nineteen mobile homes and one house located at 1200 Curd Drive.

17. The neighborhood where Plaintiff lives is informally referred to as the "Holmes Road" area. It is formally known as the Headlee Heights area.

18. The Holmes Road neighborhood (hereinafter referred to as "Holmes Road" or "Headlee Heights") was annexed into the City of Searcy pursuant to ordinance #553 on November 22, 1972.

19. The mobile home park and septic tank were constructed by Plaintiff prior to November 22, 1972.

20. Subsequent to the annexation of the Holmes Road area by the City of Searcy, the residents of the Holmes Road area requested water and sewer service from defendants.

21. Defendants citing city policy, informed the residents of the Holmes Road area that as a condition precedent to the provision of water service, said residents must pay for the cost of extending the cost of the water service lines to the neighborhood. The Board recommended that the neighborhood form a water improvement district requiring the user(s) to pay for construction of the water service line extension.

22. Likewise, Defendants, citing city policy, informed the residents of the Holmes Road area that as a condition precedent to the provision of sewer service, said residents must pay for the cost of extending the sewer service lines to the

neighborhood and recommended that the neighborhood form a sewer improvement district to meet their needs.

24. Defendants were not persuaded by Plaintiff's argument, and insisted that the Holmes Road area residents pay for the cost of extending the required service lines before water service could be provided.

25. Ultimately, in the early 1980's the residents of the Holmes Road area, with the active assistance of Plaintiff, formed the North Searcy Water Improvement District #1, and thereafter were able to comply with the city's payment policy and the water service lines were extended to enable the Holmes Road area residents to receive water service from Defendants.

26. While his neighbors were assembled in an effort to form the water improvement district, Plaintiff attempted to persuade them that they should establish a sewer improvement district at the same time and seek sewer service so that they could avoid the tedious task of reassembling for that purpose at a later time.

28. The City of Searcy has a sewer line which runs along Highway 16 and Highway 16 runs close to the Holmes Road neighborhood.

29. Defendants began building the Deener Creek sewer trunk line extension in roughly June of 1993, and construction was completed in about March of 1994.

30. The Deener Creek sewer trunk line extends 4,600 feet outside the city limits of Searcy.

31. There are landowners located in the area outside of the city limits of Searcy where the Deener Creek extension is located.

32. The area outside the city limits of Searcy where the Deener Creek extension is located is ideal for development.

34. The North Searcy Water Improvement District #1 lies about a quarter of a mile north of the Deener Creek extension.

36. Furthermore, Plaintiff argued that Defendants were,

despite the Defendants' policy, **required** to pay for the cost of extending the sewer service line to the Plaintiff's property so long as Plaintiff was willing to gradually pay Defendants back, after they were connected to the line, through extra monthly charges on their sewer bills.

37. Defendants refused to build such a line until the people to be served by the extended sewer service line paid for the cost of extending the service line.

38. Plaintiff, citing ACA 14-40-606,[1] argued to Defendants that Defendants have an absolute duty to extend sewer lines to all city residents.

Plaintiff's position is that it is overly burdensome for the defendants to require the individual end user in areas annexed by the City to pay for the costs of the extension lines up front. He contends that persons who buy in developments constructed after annexation have a portion of their development's sewer system, which was paid in full by the developer, financed as part of the cost of their home while persons annexed after development must pay the entire cost up front. Plaintiff asserts that defendants could finance sewer projects for such areas such as a bond issue. He argues that since his freedom of movement has been limited by his need to stay close to home to maintain and problem-solve his septic tank sewer system, the defendant's policy must meet the strict scrutiny test. Plaintiff further contends that defendants have misappropriated and misused the funds to build the Deener Creek sewer trunk line extension based on the opinion of the defendants that the City would grow to encompass that area and defendants have failed to address his

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1. "As soon as the resolution or ordinance declaring the annexation has been adopted or passed, the territory shall be deemed and taken to be a part and parcel of the limits of the City or incorporated town, and the inhabitants residing therein shall have and enjoy all the rights and privileges of the inhabitants within the original limits of the City or incorporated town."

claims of annexation for taxation purposes and misappropriation of funds so that he is entitled to summary judgment.

Defendants reason that the plaintiff is entitled to the right and privilege of complying with the policy to obtain city sewer service which requires the person, either alone or together with his neighbors, to finance the cost of building the service line needed to extend the sewer system to the subject property relying on Peay v. Kingsworthy, 126 Ark. 323, 190 S.W. 565 (1916) that approved and applied Ark. Code Ann. 14-235-305 which provides in part the following:

> (a) The city council shall require, by ordinance, the terms, time, and manner, and the compensation which shall be paid by ... private parties ... upon compliance with which the parties may tap the sewers of the municipality.
>
> (b) No person shall be allowed to tap any sewer without paying in proportion to the value of his property to be benefited by it, as compared with the value of the property taxed in the district and the actual cost of the sewer.

Defendants counter plaintiffs arguments regarding due process and equal protection with City of Marion v. Baioni, 312 Ark. 423, 850 S.W. 2d 1 (1993) that found no equal protection violation when a rational basis was presented concerning the city ordinances requirements of payment of different sewer and water "tap and access" fees for residential and non-resident users. They state that wealth is not a suspect classification, that their policy does not affect plaintiff's travel from state to state, and that rationally related governmental decisions applied in a same manner in which other similarly situated citizens is all that is required by the equal protection and due process clauses concerning the provision of sewer service. Defendants further

maintain that the City's business decision to build the Deener Creek extension was a valid exercise of the broad discretionary powers regarding sewer service.

Based on the undisputed facts as recited above, the Court finds that defendants are entitled to summary judgment on all aspects of plaintiff's complaint. The authorities cited by defendants are also supported by Blackwell v. City of St. Charles, 917 F. 2d 1150 (8th Cir. 1990) (affirming finding of no legally enforceable right of access to the city's sewer and water systems) and Barnhardt v. City of Kannapolis, 447 S.E. 2d 471 (N.C. 1994), review denied, 452 S.E. 2d 807 (rejecting that city had failed to provide municipal water and sewer services as required by annexation plan and statute).

Accordingly, plaintiff's June 16th motion for partial summary judgment (#27) is denied. Defendants' July 3rd motion for summary judgment (#33) is granted. Defendants' September 14th motions to compel discovery (#43) and to extend discovery deadline (#45) and October 18th motion in limine (#52) have been rendered moot by the defendants' grant of summary judgment.

IT IS SO ORDERED this 21st day of November, 1995.

s/ George Howard, Jr.
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 11-24-95 BY B.M.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VERNON L CURD PLAINTIFF

v. Civil No. LR-C-95-112

CITY OF SEARCY, ARKANSAS, ET AL. DEFENDANTS

JUDGMENT

In accordance with the separate order filed this date, summary judgment is entered in favor of defendants.

DATED this 21st day of November, 1995.

s/ George Howard, Jr.
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 11-24-95 BY B.M.

SEARCY MEDICAL CENTER, P.A.

December 6, 1995

Vernon Curd
1200 Curd Dr
Searcy, AR. 72143

SMC # 8441

TO WHOM IT MAY CONCERN:

Mr. Vernon Curd is a patient whom I have treated for approximately 3 years following a diagnosis of carcinoma of the sigmoid colon. The patient has no evidence of recurrent disease at this time, but due to the seriousness of the condition, serious stress could prove detrimental over a long term. The patient has multiple other problems also treated which also would be adversely affected by serious stress.

Sincerely,

s/ William M. Gibbs, III, M.D.
William M. Gibbs, III, M.D.
WMG / rl

SEARCY MEDICAL CENTER, P.A.

November 20, 1995

RE: Vernon Curd
SMC# 008441

TO WHOM IT MAY CONCERN:

Mr. Vernon Curd is a gentleman that I have treated for a number of years. He has several significant medical problems. In 1992 he was found to have carcinoma of the colon. He underwent surgery and then one year of chemotherapy for this problem. He has a cardiac condition that is known as cardiomyopathy. This causes him to have an irregular heart rate which is called atrial fibrillation. It also makes him subject to going into congestive heart failure. He requires constant medication to control his heart condition. Also, as a result of his heart condition, he has had a couple of small strokes in the past. He requires a permanent pacemaker which was implanted three years ago.

Mr. Curd is presently stable from a medical standpoint. He, however, requires several medications and close medical supervision to help keep him maintained at an optimal level. A serious stress could prove potentially detrimental to his overall condition.

If there are any questions, please do not hesitate to contact me.

Sincerely,

s/ Leon Roby Blue, M.D.
Leon Roby Blue, M.D.
LRB / rl